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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 405–416) is reported at 255 F. Supp. 704. The findings and order of Division 3 of the Interstate Commerce Commission (R. 197–202) and the order of the full Commission (R. 304–305) are not reported.

JURISDICTION

The order of the district court dismissing the complaints was entered on April 11, 1966 (R. 417), and the notice of appeal was filed on May 3, 1966 (R. 418–

429). This Court noted probable jurisdiction on October 17, 1966 (R. 432; 385 U.S. 897). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

Railway Express Agency, Inc. ("REA") applied to the Interstate Commerce Commission for authorization, under Section 20a of the Interstate Commerce Act, to issue 500,000 shares (or 20%) of its capital stock for sale to the Greyhound Corporation at $20 per share. REA's application disclosed that Greyhound has undertaken, upon acquisition of those shares, to offer for 60 days to purchase up to 1 million shares of REA's outstanding stock, all of which is owned by 60 railroads. Each railroad has a right of first refusal as to the outstanding shares, and some of the railroads have indicated an intent to exercise that right. Finding the issuance of the 500,000 shares for sale to Greyhound to be both provident and urgently needed, the Commission authorized the issuance under Section 20a but declined to decide, pending the outcome of Greyhound's 60-day offer, any questions of control or anticompetitive effect under Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act. The questions presented are:

1. Whether the Commission has power to approve a financial transaction under Section 20a while postponing consideration of possible control and competition issues until the relevant facts become known.

2. Whether the Commission abused its discretion in the circumstances of this case.

STATUTES INVOLVED

The pertinent portions of Sections 5, 20a, and 214 of the Interstate Commerce Act, 49 U.S.C. 5, 20a, 314, are set forth in the appendix to this brief (*infra,* pp. 35–44).

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (R. 417) dismissing appellants' suit to set aside an order (R. 197–202, 289–290, 304–305) of the Interstate Commerce Commission. The order granted the application of the Railway Express Agency, Inc. ("REA"), under Sections 20a and 214 of the Interstate Commerce Act, to issue 500,000 shares (or 20%) of its common stock for sale to the Greyhound Corporation.

THE STATUTORY SCHEME

Section 20a of the Interstate Commerce Act (49 U.S.C. 20a) provides that before a carrier may issue stock or other securities it must obtain the approval of the Interstate Commerce Commission. The Commission may authorize such issuance if it finds that it "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose" (Section 20a(2)). The Commission may hold hearings "if it sees fit" (Section 20a(6)). Section 214 of the Act makes Section 20a applicable to motor carriers.

Section 5(2) of the Act authorizes the Commission to approve acquisitions of the control of a carrier if it finds that the acquisition is consistent with the public interest. The Commission may conduct hearings if "it shall consider it necessary" (Section 5(2)(b)). Any acquisition approved under Section 5(2) is exempted from the antitrust laws by Section 5(11). Under Section 5(4) it is unlawful for any carrier to acquire control of a carrier without Commission approval. Upon complaint or upon its own initiative, the Commission may, under Section 5(7), determine whether any person has acquired unlawful control and require it to take such action as is necessary to prevent continuance of the violation.

The Commission also has jurisdiction under Section 11 of the Clayton Act (15 U.S.C. 21) to enforce Section 7 of that Act (15 U.S.C. 18) against acquisitions of the stock or assets of carriers subject to its jurisdiction where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

BACKGROUND

REA is a common carrier by express on railroads and a common carrier by motor vehicle, subject to the jurisdiction of the Interstate Commerce Commission (R. 1).[1]

Greyhound, through its wholly owned subsidiary, Greyhound Lines, Inc., operates a nationwide passenger bus system and, like other bus companies, also

[1] REA also operates as an indirect air carrier subject to regulation by the Civil Aeronautics Board (49 U.S.C. 1301(3)) and provides ocean service under regulation by the Federal Maritime Commission (46 U.S.C. 801).

carries some small-package express shipments on its passenger buses (R. 353).

REA is presently owned and controlled entirely by railroads. Its charter authorizes 2,576,000 shares of common stock, of which 1,999,188 shares have been issued. At the time of the proceedings before the Commission, sixty railroad stockholders owned the outstanding stock (including the five railroad appellants herein,[2] which together own slightly more than 10%) (R. 40–41). Sale of all outstanding stock is subject to a right of first refusal by the railroad shareholders (R. 83). On the other hand, 500,000 unissued shares are not subject to that right. The railroad stockholders also hold approximately $27 million in REA notes. In 1962, the Commission authorized REA under Section 20a to have non-railroad stockholders (R. 6). *Railway Express Agency, Inc., Stock* I.C.C. Finance Docket No. 22349, December 21, 1962. This case involves the first application to the Commission to implement that authority.

Under its by-laws, REA is governed by a board of directors with 25 members. Seven members are elected at large,[3] and 18 members are nominated by the railroad stockholders, grouped into three regional districts. The Eastern District (with 1,085,748

[2] The Denver and Rio Grande Western R. Co., The Atchison, Topeka and Santa Fe Ry. Co., St. Louis Southwestern Ry. Co., St. Louis Southwestern Railway Company of Texas, and Southern Pacific Company.

[3] There are now two vacancies among the at-large directors. When and if the sale of 500,000 shares to Greyhound is consummated, Greyhound will be entitled to name 5 of the 7 (R. 15).

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shares) nominates 7 directors; the Western District (with 633,180 shares) nominates 6; and the Southern District (with 280,260 shares) nominates 5 (R. 36). The right of each district to nominate a specified number of directors does not depend upon the number of shares its members hold and can be changed only by a vote of two-thirds of the outstanding stock (R. 90).

From 1929 to 1961 REA was operated on a non-profit basis as a service organization for railroads participating in a pooling agreement approved by the Commission. *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I.C.C. 423. Its profits or losses were shared by the railroad stockholders. In 1961 it changed to a profit-and-loss basis and began to acquire facilities and equipment, which had previously been leased or otherwise obtained from the railroads (R. 34).

Its program of capital expenditures to acquire and modernize the terminals and equipment needed for a viable, independent existence severely drained its resources. From 1960 through August 1964, it made capital expenditures of almost seventeen million dollars, borrowing over $8.5 million for this purpose. At the time of the Commission proceedings, $8,468,000 of this debt remained unpaid. Moreover, continuation and completion of its terminal and equipment program was estimated to require additional capital expenditures of almost forty million dollars (including $27 million for terminals and $10 million for automotive equipment) (R. 5–6, 11–14, 34). To raise this large sum would require substantial debt financing. In view of REA's short history of profitable opera-

tions, and its unfavorable ratio of debt to equity, such new borrowing was expected to be quite difficult (R. 200).[4]

REA'S NEGOTIATIONS WITH GREYHOUND

In January 1964, Greyhound submitted to REA a tentative proposal to purchase, subject to Commission approval, at least 51 percent of REA's outstanding stock, and an additional 16 percent for resale to airlines (R. 82–83, 93–97). As part of that proposal, Greyhound offered to finance its pro rata share of REA's capital requirements. During the course of negotiations on Greyhound's offer, operating personnel of Greyhound and REA prepared a joint, preliminary estimate of economies which might be realized through consolidation of various facilities of the two companies (R. 88–89). Their report (R. 149–156) did not purport to commit either company to any course of action. Greyhound's offer was, however, contingent upon the waiver by all present stockholders (including appellant railroads) of their right of first refusal, and was not accepted.

In July 1964, Greyhound submitted a second offer to REA (R. 109–112). Greyhound asserted its interest in achieving the economies and improved service which might be realized through the "combination and correlation" of some operations of the two companies, but stated "that in order to give Greyhound an incentive to pursue these possibilities it should have at least a 20% equity interest in REA" (R. 109–110). To that end Greyhound offered to purchase 500,000

[4] For a history of REA's difficulties, see *Study of REA Express*, issued by Staff Liaison Group V–C, Civil Aeronautics Board, Federal Maritime Commission and Interstate Commerce Commission (August, 1965).

shares of authorized but unissued stock at $16 a share, on the following conditions: (1) Greyhound would be permitted to name 20% of the board of directors. (2) REA would undertake to secure from its noteholders waiver or cancellation of a prohibition against payment of dividends. (3) REA's board would declare the intention "to consider seriously and work toward a long-term agreement" for coordination of operations. (4) REA's board would declare the intention "to seriously consider at a later time" sale of REA stock to airlines or the general public. Greyhound further offered to purchase, for not more than $25 per share, such additional shares as the present stockholders might tender up to 749,594 shares (which, together with the initial 500,000 shares, would give Greyhound a 50% interest), thereby creating a market for those stockholders that wished to sellout. It recognized that some railroad stockholders were opposed to its acquisition of the additional shares, which are subject to the right of first refusal, but was "willing at this time to proceed upon the basis of the foregoing offer, leaving to the future the question of the acquisition of additional shares by Greyhound and giving the railroads an opportunity to reconcile their views on this question" (R. 111).

At a meeting of REA's board on July 28, 1964, to consider this proposal, railroads opposed to Greyhound asserted their intention to exercise their right of first refusal in order to prevent Greyhound from acquiring any shares in addition to the 500,000 to be issued. They protested that it was unfair to require them to pay $25 per share in exercise of this right

when Greyhound was acquiring shares at $16. To accommodate them, the Board unanimously voted to negotiate a uniform price for both outstanding and unissued shares of $20 per share. At the same meeting the Eastern railroads represented that at least 900,000 shares would be offered for sale to those railroad stockholders that chose to exercise their right of first refusal (R. 83–84, 113). Greyhound subsequently agreed to offer a uniform price of $20 per share and undertook to buy up to one million shares of outstanding stock at that price.

On September 1, 1964, the REA board approved the Greyhound proposal by a vote of 14 to 3[*] and adopted resolutions complying with the conditions thereto. It also recommended to the stockholders that they authorize the issuance of the 500,000 shares of stock and that the by-laws be amended so as to permit Greyhound, upon acquisition of those shares, to nominate 5 of the at-large directors (R. 114–125). On October 1, 1964 the railroad stockholders approved the proposals by a vote of 1,654,572 to 269,880 shares. The opposing votes were cast by seven western railroads, including the five railroad appellants (R. 86).

On October 6, 1964, Greyhound accepted REA's tender of the 500,000 shares of unissued stock at $20 per share and became obligated to offer, for a period of 60 days after consummation of the initial stock sale, to purchase an additional one million shares of

[*] The opposing directors were affiliated with the Atchison, T. & S.F. and Southern Pacific railroads, who are appellants here, and the Missouri Pacific railroad (R. 130–131).

REA's outstanding stock, subject to the railroads' right of first refusal (R. 15–18).

PROCEEDINGS BEFORE THE COMMISSION

Pursuant to Section 20a, REA applied to the Commission on October 7, 1964, for approval of its issuance of 500,000 shares for sale to Greyhound (R. 1–32). The application and two supplementary statements required by the Commission (R. 33–41, 82–158) set forth detailed factual data concerning the proposed transaction, including the history of prior negotiations, REA's financial needs, and the uses to which the $10 million realized by the sale would be put. Those data have not been disputed.

Six groups of private intervenors opposed the application, urging in general that the Commission should conduct a hearing under Section 20a or determine under Section 5 whether Greyhound was acquiring control of REA. There was wide variation in the interests and positions of the intervenors:

(1) Six western railroad-stockholders, which had voted against the transaction, urged that it did not meet the requirements of Section 20a; one such railroad, Southern Pacific Company, filed a complaint under Section 5(7) charging Greyhound with unlawfully attempting to obtain control of REA without Commission approval, in violation of Section 5(4) (R. 48–50, 50–52, 63–65, 68–70, 71–73).

(2) The Transcontinental Bus System and 16 other bus companies which compete with Greyhound for bus traffic, and with Greyhound and REA for express business, filed what they characterized as "a petition

to broaden the issues" beyond the "limited and narrow" scope of Section 20a (R. 66). In particular, they requested the Commission to require REA and Greyhound to file an application under Section 5, since "[u]nlike Sections 20a and 214, Section 5 does allow, and in fact makes specific provision for, the presentation of the issues necessary for a determination of the question as to whether or not Greyhound should be allowed to consolidate its facilities and operations with those of R.E.A." (R. 67).

(3) The National Trailways Bus System, whose members also compete for bus and express business, claimed that acquisition by Greyhound of REA's operating rights and properties would result in destructive competition and would create a monoply (R. 60–62).

(4) The American Trucking Associations and its Regular Common Carrier Conference, whose members compete for freight with REA's express service, urged that, whether or not Greyhound acquired an additional 1 million shares, it might obtain control of REA and that REA's application constituted "an attempt to effect control of REA by Greyhound without going through a Section 5 proceeding" (R. 79–82).

(5) The Freight Forwarders Institute urged that REA's application be treated as "a mere launching pad for the lodgment in Greyhound of control of REA" which might lead to REA's conversion into a freight forwarder with "catastrophic" results for the Institute's members (R. 42–47).

(6) Denver Chicago Trucking Co., Inc., and other

independent truckers argued that the transaction was the first step in a plan of acquisition by Greyhound which, because of REA's recently acquired authority to offer container service,[6] would injure them by bolstering REA's competitive potential (R. 172–179).

The United States also intervened (R. 75–78). It urged the Commission "to institute a proceeding for the purpose of determining whether Section 7 of the Clayton Act would be violated by Greyhound's acquisition of REA stock under the circumstances and conditions outlined in REA's application" (R. 76). While taking no position as to whether a question of control under Section 5 was presented, the Department of Justice pointed out that a Section 5 proceeding might well be consolidated with a Section 7 proceeding "[s]ince the anticompetitive issues raised by a Clayton Act Section 7 proceeding are virtually identical to the competition issues which the Commission must consider in a Section 5 control proceeding" (R. 77–78).

The Greyhound Corporation intervened in support of the application (R. 73–75). It asserted that "because of the right of first refusal of [the] railroad stockholders * * * it is unlikely that Greyhound will acquire any more than [a] 20% interest in the future. In the event that Greyhound should subsequently acquire any additional stock interest which would even approach a position of control, Greyhound would

[6] *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, 323 I.C.C. 468, sustained, *New England Motore Rate Bureau Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass.), affirmed *per curiam* No. 591, this Term (December 5, 1966).

file an appropriate application under Section 5" (R. 74).

In reply to the various petitions, REA denied that any issue of control was presented by the transaction, citing the structure and composition of its board and the concentration of its stock in the hands of the railroads (R. 167–169). It also urged that the issues of control and of anticompetitive consequences were premature in the circumstances and that should they arise "all petitioners will have ample opportunity to participate in an appropriate proceeding under Section 5" (R. 164).

On March 15, 1965, Division 3 of the Commission approved the issuance of the 500,000 shares under Section 20a (R. 197–202). With respect to the intervenors' petitions, the Commission found that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time; and that a hearing is not necessary for a determination of the application for authority to issue [the] stock under the provisions of sections 20a and 214" (R. 198).

With respect to REA's application, the Commission found that REA urgently needs the $10,000,000 to be realized through the stock issue, that it is handicapped in borrowing capital funds because of its unfavorable debt-equity ratio, that the stock issue would improve the ratio while reducing the need for future borrowing, and that the sale price is fair and reasonable (R.

200). Cautioning that nothing in its order "shall be construed as a determination of any matter under any section of the act, except sections 20a and 214 * * * or as creating a presumption as to any action which may be taken on any * * * application under section 5" (R. 201), the Commission concluded that the stock issue

> * * * (a) is for a lawful object within [REA's] corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company * * * and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose * * *. (R. 201.)

Petitions for reconsideration were denied by Division 3 acting as an Appellate Division on May 28, 1965 (R. 289–290). Upon reconsideration by the full Commission, the action taken by Division 3 in its order of March 15, 1965, was affirmed on August 11, 1965 (R. 304–305).

JUDICIAL PROCEEDINGS

This action to enjoin and set aside the Commission's order was commenced on June 16, 1965, in the United States District Court for the District of Colorado (R. 308). The Commission postponed the effective date of its order pending the completion of these proceedings (R. 306–307). The United States filed an answer in the district court declining either to support or oppose the order of the Commission (R. 375).

On April 11, 1966, a unanimous three-judge district

court sustained the Commission's order (R. 405–416). The district court held that no "categorical answer" could be given to the question "whether, when a control question is raised, it must be decided in advance of a Section 20a approval of the issuance of stock" (R. 414). Recognizing that in some instances "consideration of the public interest may require such determination", the court held that in the present case the Commission had acted reasonably in determining that "the public interest requires the issuance of the stock" while deferring questions of control and anti-competitive effect until "after the chain of events started by the stock issuance is ascertainable rather than conjectural" (R. 414, 415). Noting the uncertainties created by the 60-day offer, the railroads' right of first refusal, the peculiar structure of REA's board of directors, and the highly tentative state of plans for coordination of REA and Greyhound facilities (R. 412–413) the court concluded that "[u]ntil the facts are developed by occurrences after the stock issuance, hearings on control and competitive effects are no more than an exercise in futility" (R. 416). The court stressed that, while determining that the issuance "meets the standards fixed by Section 20a(2)" (R. 415), neither the Commission nor the court had decided "any questions relating to control or competition. They are for the future" (R. 416).

ARGUMENT

INTRODUCTION AND SUMMARY

REA'S financial difficulties have been a source of concern for a number of years to the regulatory

agencies charged with responsibility for its services and to Congress.[7] The origin and nature of those problems have been briefly indicated above (pp. 6–7). The continuing efforts to solve them have been predicated on the belief that REA "occupies a useful place in the transportation of small shipments," that its services are extremely valuable, and that, after a stormy transition, it can establish itself on a sound financial footing. *Express Contract, 1959,* 308 I.C.C. 545, 550.

This background to REA's application for authorization to issue stock under Section 20a is not disputed by any party to these proceedings. Nor has any party challenged the Commission's findings that REA "urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep its operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000"

[7] See *Study of REA Express* issued by Staff Liason Group V-C, Civil Aeronautics Board, Federal Maritime Commission, and Interstate Commerce Commission (August, 1965); S. Rep. No. 1534, 89th Cong., 2d Sess., at pp. 5–7; *House Hearings before the Subcommittee on Postal Rates of the Committee on Post Office and Civil Service on H.R. 12367 and related bills,* 89th Cong., 2d Sess. (at pp. 468–479); *Senate Hearings before the Committee on Post Office and Civil Service on H.R. 14904,* 89th Cong., 2d Sess. (at pp. 623–624); *Express Contract, 1959,* 308 I.C.C. 545.

(R. 200). On that basis, the Commission determined that the issuance met the standards of Section 20a(2). Because those findings were not disputed and because the Commission declined to decide any other questions, there was no reason for the Commission to hold hearings as Section 20a(6) authorizes it to do "if it sees fit, to enable it to determine its decision upon the application for authority."[8]

The fundamental question presented here is whether the Commission violated its statutory mandate or abused its discretion in deciding no more than it did. Appellants urge that, prior to acting on REA's application for authority to issue stock, the Commission was required to consider the questions of control and anticompetitive effect arising from Greyhound's acquisition of the 500,000 shares to be issued, its potential acquisition of additional stock during the 60-day offer, and the possible ultimate implementation of Greyhound's interest in coordinating or consolidating various facilities and services of the two companies. Appellants contend that these considerations should have been assessed either under the "lawful object" and "public interest" standards of Section 20a(2) or under the standards of Section 5(2) and the Clayton Act's Section 7.

No one denies that the present and prospective

[8] Appellants point out (Br. 57) that "if the lower court was correct in holding that the Commission was not obliged to consider the section 7 and section 5 issues, then it was indisputably within the Commission's discretion to pass upon the fiscal aspects of the REA proposal without a hearing." We concur. We also agree with appellants that if, contrary to our view, the Commission was obliged to consider those issues, a hearing probably was needed to ascertain the relevant facts.

arrangements between REA and Greyhound, as reflected in the information supplied the Commission by REA, may entail the acquisition of control of REA by Greyhound and may have a considerable impact on competition. But it also seems evident that a complete assessment of both the control and the competitive effect questions cannot be accomplished at the present time. While, depending upon the attendant circumstances, Greyhound's acquisition of 500,000 shares may or may not constitute an acquisition of control, certainly the full significance of the transaction depends largely on occurrences during the 60-day offer period. During that period it is possible (1) that no shares will be tendered for sale; (2) that up to 1 million shares will be tendered and acquired by Greyhound, giving Greyhound a 60% interest in REA; or (3) that up to 1 million shares will be tendered and one or more of the dissident railroads (including the railroad appellants) will exercise their right of first refusal thus acquiring an interest of up to 50.8% and leaving all the railroads stockholders with an aggregate interest of up to 80%.* Which of these possibilities will be realized, and to

*The dissident REA stockholders include, in addition to appellants, the Missouri Pacific Railway Co., and the Texas & Pacific Railway Co. (R. 86). At the time of the proceedings before the Commission, the dissident railroads together owned 269,880 shares (R. 40), so that if one or more of them acquired the additional million shares they would own 1,269,880 shares out of a total of 2, 499,188, or 50.8% of REA's stock. We are advised that the holdings of the dissident group have subsequently been increased through the acquisition of 23,355 shares by a subsidiary of the Southern Pacific Co. from the Chicago, Rock Island, & Pacific R.R. Co.

what extent, cannot be foretold. Nor can it be determined at this time what effect the outcome will have upon the ability and desire of Greyhound to pursue its interest in consolidating facilities and services with REA.

Under these circumstances, the Commission held that "an investigation of whether the proposed transaction, or further proposed agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time" (R. 198). The Commission went on to make it perfectly clear that it was in no way prejudging any question properly cognizable under Section 5 or Section 7 and that no remedy available under those sections was foreclosed. The Commission stressed that "if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition * * * and that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any * * * application under section 5" (R. 201).

The United States, having requested the Commission to institute an investigation into the competitive consequences that might emerge from Greyhound's financial interest in REA, continues to believe that serious questions on this score remain to be investigated. However, the United States acquiesces in the

Commission's view that in the circumstances of this case such investigation may properly be deferred until all the relevant facts are known after completion of the 60-day offer.

We show below (pp. 21–28) that Section 20a was designed to give the Commission power to prevent carriers subject to its jurisdiction from engaging in fraudulent or improvident financial operations, while Section 5 gives the Commission broad powers to deal with problems of inter-carrier control and the anti-competitive effects thereof. We urge that the language and history of Section 20a, and its rational relationship to Section 5, demonstrates that proceedings under Section 20a cannot properly be made to serve the function of proceedings under Section 5 and that the Commission has power to authorize a securities issue under Section 20a while postponing consideration of issues cognizable under Section 5.

We also show (pp. 28–33) that in postponing consideration of such issues in the circumstances of this case the Commission properly exercised its discretion. We urge that the Section 5 issues involved here can be disposed of more efficiently and intelligently when the full extent of Greyhound's interest in REA is known, that the appellants' interests are not threatened *pendente lite,* that no remedy available to appellants or to the United States has been foreclosed, and that the urgency of REA's need for the proceeds of the stock issue warranted the prompt disposition of its Section 20a application.

I

THE COMMISSION HAS POWER TO AUTHORIZE A SECURITIES ISSUE UNDER SECTION 20a WHILE POSTPONING CONSIDERATION OF QUESTIONS OF INTER-CARRIER CONTROL AND ANTI-COMPETITIVE EFFECT COGNIZABLE UNDER SECTION 5

Section 20a of the Interstate Commerce Act makes the issuance by a regulated carrier of "any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier" (other than short-term notes) and the assumption by the carrier of "any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person" subject to the prior authorization of the Commission. This grant of substantial regulatory power over the financial structure of carriers was enacted in 1920 in response to the fraudulent and improvident transactions in railroad securities that had marked the preceding half-century. "[I]ts dominant purpose was to maintain a sound structure for the rehabilitation and support of railroad credit, and for the consequent development of the transportation system"; it was also intended "indirectly, to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing * * *." Sharfman, *The Interstate Commerce Act* (1931) Part I, 190. See *Chicago, South Shore and Sound Bend R.R.* v. *United States,* 221 F. Supp. 106, 108 (N.D. Ind.). As appears from the report of the House Committee on Interstate Commerce, a subsidiary purpose was to provide a form of financial regulation that would prove more expeditious than the unduly time-consuming proceedings experienced

before numerous State authorities (H. Rep. 456, 66th Cong., 1st Sess., at 21):

> Section 437 gives the commission control over stock and bond issues. * * * Had such provisions been on the statute books during the last 10 years the financial wrecking of such roads as the Frisco, the Rock Island, Pere Marquette, Pittsburgh Terminal, the New Haven, and others, would not have been possible. Provisions similar to those contained in section 437 are found in the statutes of several of the States. The experience of these States with the regulation of stock and bond issues has proven successful. Without Federal Control the carriers would have to be subjected to the diversified requirements of the several States. These requirements have been burdensome to the carriers and resulted in expense and delay. The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action.

Nothing in the language or legislative history of Section 20a suggests that Congress intended the Commission to investigate not only these financial matters but also complex questions of inter-carrier control and competitive effect as a prerequisite to authorizing the issuance of securities or the assumption of liabilities by a regulated carrier. On the contrary, the Congressional interest in the expeditious disposition of applications under Section 20a strongly suggests that to so broaden the scope of inquiry might well defeat the Congressional purpose. Moreover, the very questions

which appellants would force into the text of Section 20a are suitably dealt with elsewhere without creating the risk of unreasonably delaying the raising of funds that may, as in the case of REA, be urgently needed.

While Section 20a controls the right of a carrier to issue securities, Section 5 governs the right of a carrier "to acquire control of another through ownership of its stock or otherwise" or for two or more carriers to merge or act jointly in other ways (Section 5(2)(a)(i)). While Section 20a is addressed solely to the issuance of securities, Section 5 is concerned with control, regardless of whether obtained through the acquisition of securities upon their issuance, or subsequently in the securities market, or "however such result is attained, whether directly or indirectly" (Section 5(4)). The term "control" is defined by Section 5(4) to include "the power to exercise control". As appellants recognize (Br. 52–53), the Commission's reach under Section 5 is extremely broad. It brings within the Commission's purview any transaction that results in "a significant increase in the power" of one carrier over another. *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169. See *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 125.

Furthermore, under Section 5, the Commission is required to weigh a wide range of considerations to which Section 20a does not advert. Thus, under Section 5(2)(c), the Commission must consider, among other things: "(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the

territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transactions; and (4) the interest of the carrier employees affected." In addition the Commission has the duty to formulate and consider other factors which must be satisfied to show that the "proposed transaction * * * will be consistent with the public interest." *Schwabacher* v. *United States,* 334 U.S. 182, 193–194; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 86–88. And, of critical significance here, in a proceeding under Section 5 the Commission must thoroughly canvass the competitive consequences of the transaction, and it may not ignore the antitrust laws. *McLean Trucking Co.* v. *United States.* But if it finds, notwithstanding the anticompetitive consequences, that the acquisition's other advantages to the public interest outweigh its disadvantages, it may approve it and thereby confer immunity from the antitrust laws (Section 5(11)). *Seaboard Airline R. Co.* v. *United States,* 382 U.S. 154, 157. *McLean Trucking Co., supra; Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173.[10] Section 20a, on the

[10] The 1920 amendments to Section 5 contemplated merger of the nation's railroads into a limited number of systems in accordance with a national plan of consolidation to be adopted by the Commission. 41 Stat. 480, 481–482. Although they authorized the Commission to approve mergers and other acquisitions of control, and exempted approved transactions from the Sherman and Clayton Acts, they did not make such acquisitions unlawful if the carrier failed to obtain the Commission's authorization. As a result, transactions which were plainly anticompetitive or which would be inconsistent with the Commission's proposed plan of consolidation could be corrected by the Commission only through proceedings under Sections 7 and 11 of the Clayton Act. See *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 152 I.C.C. 721; *Inter-*

other hand, confers on the Commission no comparable power to relieve a transaction from the operation of the antitrust laws upon a finding that it has advantages outweighing its anticompetitive effects. Thus appellants' contention that the Commission is required to enforce Section 7 of the Clayton Act in a proceeding under Section 20a leads to the anomalous conclusion that a securities issue may have to be disallowed even though it might be the first step in an acquisition of control that the Commission could, on proper findings, authorize under section 5 notwithstanding antitrust considerations.

In sum, an attempt to read the Act as a rational system of regulation leads to the conclusion that questions of intercarrier control and related anticompetitive consequences are appropriately considered in proceedings under Section 5 and need not be determined in the context of Section 20a where neither language nor history suggest they belong. While there may well be circumstances in which it is appropriate for the Commission to proceed simultaneously under both sections, that is not inevitably the case as the circumstances of these proceedings makes clear. The Commission's authority under Section 5 is not diminished by the fact that issuance of the stock to be acquired

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state Commerce Commission v. *Baltimore & Ohio R. Co.*, 160 I.C.C. 785; and *Interstate Commerce Commission* v. *Pennsylvania R. Co.*, 169 I.C.C. 618. This situation was corrected by the Emergency Railroad Transportation Act of 1933, 48 Stat. 218. Congress, which made it unlawful for one carrier to acquire control of another without Commission approval (Section 5(4)), extended the definition of control to subtler forms of domination (Section 5(6)), and authorized the Commission upon its own initiative or upon complaint to take measures to terminate such unlawful control (Section 5(7)).

has been approved under Section 20a, or that the sale has been consummated. It has full power to correct any violation of Section 5 which it might find, including the power to order divestiture. *Central of Georgia Ry. Co., Control,* 307 I.C.C. 39, 43–44; *Welch—Control—Montreal New York Exp.,* 56 M.C.C. 505, 515; *Detroit & C. Nav. Co.—Control—Denver—Chicago Trucking,* 58 M.C.C. 599, 609; cf. *Gilbertville Trucking Co.* v. *United States, supra.* Were there any basis for doubt in this respect, the Commission's order in this case is explicit that its approval under Section 20a decides nothing under any other provision of the Act, and raises no presumption in favor of retention by the acquiring carrier of any interest it may purchase or approval of any relationship that may be created between REA and Greyhound, in violation of Section 5 or Section 7. All that the Commission has done is to authorize REA to issue its stock and gain $10 million in needed financing. Greyhound's relationship to REA in the light of Section 5 and Section 7 is still subject to further scrutiny. Appellants are, therefore, in precisely the same position they would be in if Greyhound were purchasing REA stock on the open market and Section 20a had never come into play.

Our view that Section 20a serves an important regulatory function that is distinct from that of Section 5 was supported before the Commission by at least some of the appellants here. Thus, Transcontinental Bus System Inc. and 16 other bus companies petitioned the Commission to institute proceedings under Section 5, asserting as we do that "[u]nlike Sections 20a and

214, Section 5 does allow, and in fact makes specific provision for, the presentation of the issues necessary for a determination of the question as to whether or not Greyhound should be allowed to consolidate its facilities and operations with those of R.E.A." (R. 67). Moreover, the Commission's power to separate Section 20 issues from Section 5 issues even when they are related is reflected in the protracted dispute over the Commission's jurisdiction to approve a stock issuance by the Alleghany Corp. *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 355 U.S. 415. In that case the Alleghany Corp., which had acquired control of the New York Central Railroad without Commission approval, applied to the Commission rather than the Securities and Exchange Commission for approval of an issue of preferred stock. The Commission took jurisdiction under Section 20a on the ground that Alleghany's control of New York Central made it a carrier within the meaning of the Interstate Commerce Act. The district court set aside the Commission's order however, on the ground that its jurisdiction to act under Section 20a could not rest upon control it had not approved, which is unlawful under Section 5(4). *Breswick & Co.* v. *United States,* 138 F. Supp. 123. This Court held that the Commission had jurisdiction and remanded for consideration of the minority stockholder's claim that the preferred stock issue, as approved by the Commission, was in violation of the Interstate Commerce Act. On remand the district court held that the Commission could not simultaneously approve the stock issue and defer the question of whether it will authorize con-

tinuation of the control upon which its jurisdiction over Alleghany depended. *Breswick & Co.* v. *United States*, 156 F. Supp. 227. This Court again reversed, holding in effect that the control issue did not have to decided before the Commission could approve the stock issuance under Section 20a. *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415. It is clear, therefore, that the Commission need not resolve Section 20a and Section 5 issues contemporaneously even when they are related.

To be sure, there may be exceptional circumstances in which the Commission should proceed at the same time under both sections. But this is not such a case. As we show below, the Commission's decision to defer consideration of questions cognizable under Section 5 in this instance was a reasonable exercise of its discretion.

II

THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN THE CIRCUMSTANCES OF THIS CASE

There are four reasons supporting the Commission's exercise of its discretion is postponing the Section 5 issues raised by Greyhound's proposed acquisition of an interest in REA. First, the Section 5 issues can be disposed of more efficiently when the full extent of Greyhound's interest in REA is known. Second, appellants' interests are not threatened with any immediate likelihood of injury pending Section 5 proceedings. Third, the appellants and the United States have adequate remedies in the courts if the Commission fails to carry out its responsibility to examine all issues of control and competition which exist

at the expiration of Greyhound's 60-day offer. Fourth, REA's need for the proceeds of the stock issue is urgent.

(1) REA's application under Section 20a confronted the Commission with two alternatives. It could either act on REA's application for authority to issue stock, and postpone consideration of the lawfulness of Greyhound's acquisition of an interest in REA for a few months until the full extent of that interest before known; or it could consider the two questions simultaneously. If the Commission had pursued the latter alternative, it might have found that Greyhound's acquisition of a 20 percent interest in a corporation dominated by railroads did not amount to control and that the anti-competitive consequences were insignificant. In that event it would have been obliged to hold a second proceeding a short time later if Greyhound succeeded in increasing its interest in REA or if the two companies agreed upon any plan of coordination or consolidation that posed questions under Section 5 or Section 7. By deferring these questions, it has not foreclosed itself; rather it has facilitated its task. Should Greyhound acquire the majority interest it is seeking, its "control" will be clear and the Commission can weigh the potential anti-competitive consequences claimed by appellants against the potential advantages claimed by Greyhound. On the other hand, if the western railroads make good their threat to exercise their right of first refusal—which is not unlikely (see, *supra,* 8–9), the Commission can more accurately evaluate the significance of Greyhound's interest in

the light of the increased stock ownership of its opponents. If it then finds that Greyhound's acquisition, whatever its final extent, conflicts with Section 5 or Section 7, it can order Greyhound to divest its holdings, impose conditions, or take other appropriate action under Section 5(2).

(2) No imminent competitive injury threatens appellants. What they fear is Greyhound's *ultimate* objective in acquiring an interest in REA—coordination of its facilities and operations with the express company. But the record is clear that it is still far short of achieving that goal. No plan of coordination or consolidation has been agreed upon between the two companies. Whether any such plan can be negotiated in the future remains to be seen.

More important, appellants are mistaken in their assumption (Br. 47) that "the Commission's grant of Section 20a(2) approval * * * forecloses the type of prophylactic relief that this Court has viewed as the most desirable remedy in dealing with probable Clayton Act violations * * *"; there is no reason to suppose that "if the Commission were to institute a proceeding in the future under section 5 (or perhaps under section 11 of the Clayton Act), much of the damage feared by appellants might be done by the time that proceeding ran its normal, protracted course." Under Sections 5(2) or 5(7) and 5(9), upon a proper showing by appellants, the Commission has ample power to grant appellants provisional relief by requiring Greyhound to place its stock in a voting trust or otherwise insulate REA from Greyhound control. See *Gilbertville Trucking Co.* v.

United States, 371 U.S. 115; cf. *Illinois Central R. Co.* v. *United States,* Nos. 687, 688, 689, this Term (January 9, 1967). Further, under Section 5(8) the district courts have jurisdiction "upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary * * *." Nor do we see any reason to doubt that, in the exercise of its authority under Section 11 of the Clayton Act, the Commission may seek a preliminary injunction in the district courts under the All Writs Act, 28 U.S.C. 1651(a). *Federal Trade Commission* v. *Dean Foods, Co.,* 384 U.S. 597.

(3) As we have shown (*supra,* p. 26), the Commission's order in no way prejudges any issue cognizable under Section 5 or under Section 7 of the Clayton Act. Since appellants clearly have no objection to the issuance of securities as such, no right in which they have an interest has been adjudicated and no remedy foreclosed. After the 60-day offer is terminated, Greyhound may well apply to the Commission under Section 5(2). Should it fail to do so, the Commission is free to proceed under Section 5(7),

either upon the complaint of appellants or the United States or upon its own initiative. We see no reason whatever to proceed now upon the assumption that the Commission will abuse its discretion then; but should it do so, the same measure of judicial review that appellants now invoke prematurely will then be available.

(4) Finally, we point to the undisputed fact that REA's need for additional financing to perform its obligations as a common carrier is urgent. The stock issue will produce $10 million in needed equity capital. REA will retain these proceeds even if Greyhound is ultimately compelled to dispose of its interest in it. Certainly it was not unreasonable for the Commission to decide that the public interest was not best served by delaying that financial infusion until proceedings under Section 5 had, in appellants' phrase (Br. 47), run "its normal, protracted course." In view of its precarious financial position, delay of proceedings under Section 20a would have served no purpose but to weaken REA. On the other hand, since the Commission retains full power to terminate any unlawful interest Greyhound may acquire, approval of the stock issue and postponement of the Section 5 proceedings has injured no one.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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FEBRUARY 1967.